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November 21, 2005

VIA ELECTRONIC FILING

Honorable Michael L. Orenstein, U.S.M.J.
United States District Court
Eastern District of New York
Long Island Courthouse
100 Federal Plaza
Central Islip, NY 11722-4438

Re: S&L Vitamins v. Australian Gold
05-CV-1217 (JS) (MLO)

Dear Magistrate Judge Orenstein:

We represent S & L Vitamins and Larry Sagarin in the above-captioned matter. We write to request an immediate conference with respect to a troubling discovery issue. We have received a copy of a subpoena served by defendant on a third party, that third party being one of plaintiff's suppliers.

Our client sells defendant's products on the Internet, and defendant wishes to shut down his business because it interferes with its attempt to monopolize the secondary market in its products. From the outset of this case, our client has worried that once defendant discovered our client's sources of product, it would stop him from receiving the product; to that end, we sought and received a protective order to prevent it from retaliating against the suppliers.

However, it now appears that defendant is attempting to do through the back door what the law will not permit it to do through the front: harass our client's suppliers so that they will stop supplying products to him. Defendant, having already served subpoenas on the suppliers, and not having receiving the imagined "smoking gun," has now served them with a second subpoena, one which is vague, overbroad, and abusive. For example, defendant has asked the subpoena recipients – all of whom are small businessmen -- for **two years'** worth of phone records for **all** of his personal and business telephone numbers. (Copies of an original and follow-up subpoena are attached as Exhibits A and B.)

Furthermore, upon information and belief, defendant's counsel has contacted plaintiff's suppliers via telephone and has threatened them with sanctions, including cutting off their supplies and revoking rebate checks which they had previously earned for selling defendant's products. If this is the case, it would seem to violate the letter, or at least the spirit, of the protective order Your Honor has already issued.

If defendant continues in this vein, it seems likely that these suppliers will be forced to break off their relationship with our client in order to maintain their own businesses; defendant will then have succeeded in circumventing the protective order and shutting down our client's business without bothering to wait for an adjudication of this case on the merits.

Respectfully submitted,

David Stein

cc: Francis J. Earley, Esquire
Scott D. Matthews, Esquire

EXHIBIT A

Issued by the
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

S & L VITAMINS, INC., Plaintiff/Counterclaim Defendant, v. AUSTRALIAN GOLD, INC., Defendant/Counterclaim Plaintiff.	05 CV 1217 (JS)(ML)
AUSTRALIAN GOLD, INC., Third Party Plaintiff, v. LARRY SAGARIN AND JOHN DOES, 1-10, Third Party Defendants,	

TO: Midnite Sun Tanning Salon
1183 Sunrise Highway
Bay Shore, NY 11706

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):
See List of Documents on Attachment A

	DATE AND TIME
Offices of Mintz Levin Cohn Ferris Glovsky and Popeo, PC, Chrysler Center, 666 Third Avenue, 25th Floor, New York, New York 10017	October 21, 2005 10:00 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subject to this subpoena for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedures 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Attorney for Australian Gold, Inc.	October 7, 2005

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Francis J. Earley, Mintz Levin Cohn Ferris Glovsky and Popeo, P.C.
Chrysler Center, 666 Third Avenue, 25th Floor, New York, New York 10017, Phone: (212) 692-6230

(See Rule 45, Federal Rules of Civil Procedure, Parts C&D on Reverse)

PROOF OF SERVICE

DATE PLACE

SERVED ON (PRINT NAME) MANNER OF SERVICE

SERVED ON (PRINT NAME) TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on ______________________
DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A Party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and reasonable attorney's fee.

(2) (A) A Person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c) (B) (iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden,

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

ATTACHMENT A

DEFINITIONS

1. The list of documents set forth below incorporates by reference the Uniform Definitions of Discovery Requests set forth in Local Civil Rule 26.3.

2. Without limiting the definition provided in Rule 26.3, the term "document" is used herein in the broadest possible sense and includes, without limitation, all originals, copies (if the originals are not available), non-identical copies and drafts of the following items, whether printed or recorded (through a sound, video, computer, digital, optical or magnetic recording system) or reproduced by hand: contracts, agreements, communications, writings, correspondence, telegrams, facsimiles, memoranda, records, reports, books, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, diaries, calendars, forecasts, statistical statements, work papers, e-mails, web-pages, electronic bulletin boards, ledgers, drafts, graphs, charts, accounts, analytical records, minutes or records of meetings or conferences, consultant's reports, appraisals, records, reports or summaries of negotiations, brochures, pamphlets, circulars, trade letters, press releases, notes, marginal notations, bills, invoices, checks, photographs, tape recordings, videotapes, microfilm, microfiche, floppy diskettes, lists, journals, advertisements, file folders, computer tapes and hard drives, source code, object code or other computer language or recording, and any other writing or medium for the storage, retrieval, recording, compilation, or transmission of data, whether mechanical, electromagnetic or other, of whatever description, however produced or reproduced, together with all programs, manuals, handbooks, passcodes, passwords, or any other information necessary to interpret or access such data, within your possession custody or control, including documents within the files of your attorneys, consultants, accountants or agents.

DOCUMENT REQUESTS

1. Any and all documents related to any communications between you and S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present.

2. Any and all copies of any contracts or agreements between you and S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin which have been executed or were in effect from January 1, 2002 through the present.

3. Any and all documents that reflect all sales made by you to S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present for any Australian Gold, Swedish Beauty and/or Caribbean Gold Products or any other tanning lotions.

4. Any and all purchase orders received by you from S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin for the purchase of Australian Gold, Swedish Beauty and/or Caribbean Gold Products or any other tanning lotions.

5. Any and all invoices related to your sale of Australian Gold, Swedish Beauty and/or Caribbean Gold Products or any other tanning lotions to S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present.

6. Any and all e-mails between you and S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present.

7. Any and all documents related to any ownership interests, management or control of your business by S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin.

8. Any and all documents which identify any distributor or supplier from whom you have ordered or purchased, or attempted to order or purchase, any Australian Gold, Swedish Beauty and/or Caribbean Gold Products from January 1, 2002 through the present, including any and all purchase orders, invoices, contracts, or agreements.

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11/03/2005 07:54 5169560888 AUTOGRAPHS AND MORE: PAGE 05

EXHIBIT B

AO 88 (Rev. 1/94) Subpoena in a Civil Case

Issued by the

United States District Court

EASTERN DISTRICT OF NEW YORK

S & L VITAMINS, INC.,

Plaintiff/Counterclaim Defendant,

v.

AUSTRALIAN GOLD, INC.,

Defendant/Counterclaim Plaintiff.

x

AUSTRALIAN GOLD, INC.,

Third Party Plaintiff,

v.

LARRY SAGARIN AND JOHN DOES, 1-10,

Third Party Defendant.

x

SUBPOENA IN A CIVIL CASE

CASE NUMBER:[1] 05-CV 1217(JS)(ML)

TO: Danny Sheehan
Yucatan Tanning Salon
79 West Main Street
Smithtown, NY 11787

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objections at the place, date, and time specified below (list documents or objects):

SEE ATTACHED EXHIBIT A

PLACE	DATE AND TIME
MINTZ LEVIN COHEN FERRIS GLOVSKY AND POPEO, P.C. Chrysler Center 666 Third Avenue New York, NY 10017	11/14/2005 5:00 p.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more

[1] If action is pending in district other than district of issuance, state district under case number.

AO 88 (Rev. 1/94) Subpoena in a Civil Case

PROOF OF SERVICE

DATE PLACE

SERVED

SERVED ON (PRINT NAME) MANNER OF SERVICE

SERVED BY (PRINT NAME) TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party service the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

INDY 1631804v.1

officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designed, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
[signature]	11/2/05

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Francis J. Earley, MINTZ LEVIN COHEN FERRIS GLOVSKY AND POPEO, P.C., Chrysler Center, 666 Third Avenue, New York, NY 10017, telephone (212) 935-3000

(See Rule 45, Federal Rules of Civil Procedure, Parts C&D on Reverse)

Exhibit A

1. All telephone records for the last two years for the telephone number (631) 265-0009 or any other telephone number used by Yucatan Tanning Salon.

2. All telephone records for Danny Sheehan's cellular telephone number, including but not limited to (631) 375-4108 or any other telephone number used by Danny Sheehan for the last two years.

3. All bank statements for Yucatan Tanning Salon for the last two years.

4. Any and all financial records of Yucatan Tanning Salon related to sales of Australian Gold™, Swedish Beauty™ or Caribbean Gold™ tanning lotions for the last two years.

5. Any and all records prepared or maintained by Yucatan Tanning Salon for purchases of Australian Gold™, Swedish Beauty™ and/or Caribbean Gold™ for the last two years.

6. All corporate tax returns for Yucatan Tanning Salon for the tax years 2003 and 2004.

7. All individual tax returns for all owners of Yucatan Tanning Salon for the tax years 2003 and 2004.

8. Any and all invoices prepared by Yucatan Tanning Salon given to or shown to Larry Sagarin, S & L Vitamins, Inc., Body Source, Steve (last name unknown), or any other agent or employee of any of them.

9. Copies of any and all rebate checks received from Australian Gold.

10. Copies of any and all correspondence between Yucatan Tanning Salon and/or any of its owners or employees and Australian Gold.

11. Any and all agreements between Yucatan Tanning Salon and Australian Gold.

Nov. 7. 2005 5:27PM SCHUBERTS AUTO BODY- No.9359 P. 6

12. An employee list of all owners and current employees of Yucatan Tanning Salon including their name, address and telephone number.

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